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APPLICATION OF THE PROCEDURE UNDER THE CHINESE EXCLUSION ACTS TO THE DETERMINATION OF THE RIGHT OF EN- TRANCE OF PERSONS OF CHINESE DESCENT ASSERTING AMERICAN CITIZENSHIP.

The utter unreasonableness and gross injustice that is often occasioned by the enforcement of the Chinese Exclusion Acts is most astoundingly impressed upon the American people by the United States Supreme Court in the recent case of *United States v. Sing Tuck*, 24 Sup. Ct. Rep. 621.

In this case certain persons of Chinese descent, alleging that they were born in this country, and therefore American citizens, were arrested on their return from abroad and detained in a place of confinement. They claimed that they were American citizens, that they were born in this country, and that they should not be treated as aliens. On their petition for release on *habeas corpus* the United States Circuit Court of Appeals for the second circuit held that they were entitled to the benefit of that writ to determine whether they were in fact American citizens. The Court of Appeals very reasonably took the position that the provisions of the Chinese Exclusion Acts were applicable only to Chinese aliens seeking admission to this country but not to those claiming American citizenship. The United States Supreme Court, however, has reversed this decision and holds that the federal courts will not interfere by *habeas corpus* with the refusal of the right of entry into the United States of Chinese persons alleging citizenship.

In an opinion notorious for its puerile argument and vainly concealing an unseemly prejudice against the unfortunate petitioners, whose claim to American citizenship, the opinion relates, "naturally raises a suspicion of fraud," Mr. Justice Holmes delivers a staggering blow to the hitherto unquestioned prestige of American citizenship. In no other country in the world, indeed, would those claiming citizenship in such country be stopped on their return to their fatherland and thrown into prison (sometimes called a house of detention) and be denied any appeal

to the courts to establish their claim to citizenship.

Roman citizenship was the highest honor and most inestimable privilege that could be bestowed by the ancient Roman government. No right was more jealously regarded and its *mere assertion* was enough to start in motion every department of the Roman government in favor of him who made the assertion. In some instances Roman citizenship was purchased and in such cases there might have been times when it was necessary to have shown evidences of citizenship, but to have been *free born* was the most princely and most priceless of all distinctions and its *mere assertion* resulted in instant protection from any proceeding that would be unlawful when a Roman citizen was among those interested or to be affected by the proceeding.

The most prominent illustration of the immediate effect of the assertion of Roman citizenship and one which puts to shame the sordid expediency of the court's argument in the principal case was the incident of St. Paul's arrest in Jerusalem, which is recorded in the twenty-second chapter of the Acts of the Apostles. It seems that on one occasion when St. Paul was in Jerusalem, the chief priests stirred up the Jewish populace against him and in the riot which followed Paul was rescued by the chief captain of the Roman guard. At this point it will be proper to permit the sacred writer to relate the narrative in his own inimitable style:

"24. The chief captain commanded him to be brought into the castle, and bade that he should be examined by scourging; that he might know wherefore they cried so against him. 25. And as they bound him with thongs, Paul said unto the centurion that stood by, Is it lawful for you to scourge a man that is a Roman, and uncondemned? 26. When the centurion heard that, he went and told the chief captain, saying, Take heed what thou doest: for this man is a Roman. 27. Then the chief captain came, and said unto him, Tell me, art thou a Roman? He said, Yea. 28. And the chief captain answered, With a great sum obtained I this freedom. And Paul said, But I was *free born*. 29. Then straightway they departed from him which should have examined him: and the chief captain also was afraid, after he knew that he was a Roman, and because he had bound him.

30. On the morrow, because he would have known the certainty wherefore he was accused of the Jews, he loosed him from his bands, and commanded the chief priests and all their council to appear, and brought Paul down, and set him before them."

Thus it is observed what magic power was in the mere assertion of Roman citizenship. It prevented all the usual proceedings and practices of a Roman guardsman toward aliens and resulted in an instant trial and finally an appeal to Caesar. Under the decisions of the courts in the principal case, however, it is possible for an American citizen to assert his citizenship in vain, and be excluded from any right of appeal or resort to the courts. It is no argument to say that this rule applies only to American born citizens of Chinese descent. Are there lower and higher degrees of American citizenship, graduated by the esteem in which the particular citizen's ancestry is held by the American people? Paul was a Jew, of a race hateful to the Roman people, and yet the fact that he was born a Roman citizen made him the equal of any other Roman citizen. But we hasten to draw the curtain on the picture of contrast thus presented. American citizenship suffering too much humiliation by the comparison.

To Justices Brewer and Peckham, however, is to be attributed much credit for their eloquent defiance and indictment of the court's opinion in the principal case. Justice Brewer in giving the opinion of the dissenting judges, refers sarcastically to the application of the procedure under the Chinese Exclusion Acts, (which, by the way, he shows to be applicable only to Chinese *aliens*), to the determination of the right of entrance into this country of one claiming American citizenship. He says:

"Can anything be more harsh and arbitrary? Coming into a port of the United States, as these petitioners did into the port of Malone, placed as they were in a house of detention, shut off from communication with friends and counsel, examined before an inspector with no one to advise or counsel, only such witnesses present as the inspector may designate, and, upon an adverse decision, compelled to give notice of appeal within two days, within three days the transcript forwarded to the Commissioner General, and nothing to be considered by him except the testimony obtained in this Star Chamber proceeding. This is

called due process of law to protect the rights of an American citizen, and sufficient to prevent inquiry in the courts. But it is said that the applicants did not prove before the immigration officer that they were citizens; that some simply alleged the fact, while others said nothing; that they were told that if they would give the names of two witnesses their testimony would be taken and considered. But what provision of law is there for compelling the attendance of witnesses before such immigration officer or for taking depositions, and of what avail would be an *ex parte* inquiry of such witnesses? Must an American citizen, seeking to return to this, his native land, be compelled to bring with him two witnesses to prove the place of his birth, or else be denied his right to return, and all opportunity of establishing his citizenship in the courts of his country! No such rule is enforced against an American citizen of Anglo-Saxon descent, and if this be, as claimed, a government of laws, and not of men, I do not think it should be enforced against American citizens of Chinese descent."

What stronger or clearer enunciation of sound principle and convincing argument is necessary to uncover the utter fallacy and dangerous doctrine enunciated by the court's opinion in the principal case! But there is no hope for judicial relief; the people themselves must demand of the national legislature the complete rehabilitation of American citizenship on such a high plane that its mere assertion will call into operation every arm of the federal government in support of him who asserts it, any provision in the Chinese Exclusion Acts to the contrary notwithstanding. No nation, indeed, can afford to permit the gratification of its unreasonable, or even reasonable, enmity and prejudice toward a certain race to destroy any of the inalienable rights and inestimable privileges of its citizens.

NOTES ON IMPORTANT DECISIONS.

CONSTITUTIONALITY OF STATUTE FORBIDDING GENERAL DAMAGES FOR LIBEL.—In *Hanson v. Krehbiel*, 75 Pac. Rep. 1041, the Kansas statute (Gen. St. 1901, ch. 57b), providing that before a civil action for newspaper libel shall be brought plaintiff must serve notice on the defendants, who, if they make retraction in their paper, are to be liable only for actual damages, is held un-

constitutional, as violating Bill of Rights, § 18, guaranteeing a remedy by due course of law to all persons injured in person, reputation, etc. The court says that the effect of the statute is to prevent a recovery of those general damages designed to compensate for "that large and substantial class of injuries arising from injured feelings, mental suffering and anguish, and personal and public humiliation." The suggestion that the retraction required by the act is an adequate substitute for remedy by due course of law, the court declines to entertain.

Courts in two states have passed upon the constitutionality of acts like the one here discussed. In Park v. Detroit Free Press Co., 72 Mich. 560, 40 N. W. Rep. 731, 1 L. R. A. 599, 16 Am. St. Rep. 544, the Supreme Court of Michigan, holding against the constitutionality, says: "We do not think the statute controls the action, or is within the power of constitutional legislation. This will, in our judgment, appear from a statement of its effect if carried out. It purports to confine recovery in certain cases against newspapers to what it calls 'actual damages,' and then defines actual damages to cover only direct pecuniary loss in certain specified ways, and none other. In some of these defined cases the proof of any damages in this sense would be impracticable, and in all it would be very difficult. They are confined to damages in respect to property, business, trade, profession, or occupation. It is safe to say that such losses cannot be the true damage in a very large share of the worst cases of libel. A woman who is slandered in her chastity is, under this law, usually without any redress whatever. A man whose income is from fixed investment or salary or official emolument, or business not depending upon his repute, could lose no money directly unless removed from the title to receive his income by reason of the libel, which could seldom happen. If contradicted soon, there could be practically no risk of this. And the same is true concerning most business losses. The cases must be very rare in which a libel will destroy business profits in such a way that the loss can be directly traced to the mischief. There could never be any loss when employers or customers know or believe the charges unfounded. The statute does not reach cases where a libel has operated to cut off chances of office or employment in the future, or broken up or prevented relationships not capable of an exact money standard, or produced that intangible but fatal influence which suspicion, helped by ill will, spreads beyond recall or reach by apology or retraction. Exploded lies are continually reproduced without the antidote, and no one can measure with any accurate standard the precise amount of evil done or probable. There is no room for holding, in a constitutional system, that private reputation is any more subject to be removed by statute from full legal protection than life, liberty, or property. It is one of those rights necessary to

human society that underlie the whole social scheme of civilization. It is a thing which is more easily injured than restored, and where injury is capable of infinite mischief." This case has subsequently been specifically approved by the same court in McGee v. Baumgartner, 121 Mich. 287, 80 N. W. Rep. 21, where the court holds: "The right to recover in an action of libel for damages to reputation cannot be abridged by statute." A contrary view was adopted by a divided court in Allen v. Pioneer Press Co., 40 Minn. 117, 41 N. W. Rep. 936, 3 L. R. A. 532, 12 Am. St. Rep. 797. In criticising this last mentioned case the court in the principal case said: "The conclusion of the court in this case is based largely upon the reasoning that the retraction being required, as it is, to be published as widely and to substantially the same readers as the original, is usually a more complete redress for the injury inflicted than would be a judgment for damages. This, however, is merely an assumption, and may or may not be true; but, even if true, this would not be 'remedy by due course of law,' as contemplated in the constitution, as we have already determined. We are well persuaded that the criticised act takes from the libeled person the right of remedy by due course of law for an injury suffered in his reputation, and hence is invalid under the quoted constitutional provision."

CONSTITUTIONAL LAW—VALIDITY OF JOHNSON GRASS STATUTE AS DISCRIMINATING AGAINST RAILWAY COMPANIES.—Johnson grass or Russian thistle as it is sometimes called, is a most inveterate enemy of the farmer and most difficult to eradicate after it decides to take up its abode in any particular locality. This grass has been the subject of much legislative regulation, a most prominent example of which is the Texas statute providing for a penalty in favor of contiguous farm owners for railroad companies for permitting such grass or thistle to go to seed upon their right of way. This statute has just engrossed the serious attention of the United States Supreme Court, and by a division of the judges thereof held constitutional. Missouri, Kansas & Texas R.R. v. May, 24 Sup. Ct. Rep. 638. Mr. Justice Holmes, writing the opinion, says:

"It is admitted that Johnson grass is a menace to crops, that it is propagated only by seed, and that a general regulation of it for the protection of farming would be valid. It is admitted, also, that legislation may be directed against a class when any fair ground for the discrimination exists. But it is said that this particular subjection of railroad companies to a liability not imposed on other owners of land on which Johnson grass may grow is so arbitrary as to amount to a denial of the equal protection of the laws. There is no dispute about general principles. The question is whether this case lies on one side or the other of a line which has to be worked out between cases differing only in

degree. With regard to the manner in which such a question should be approached, it is obvious that the legislature is the only judge of the policy of a proposed discrimination. The principle is similar to that which is established with regard to a decision of Congress that certain means are necessary and proper to carry out one of its express powers. *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579. When a state legislature has declared that, in its opinion, policy requires a certain measure, its action should not be disturbed by the courts under the fourteenth amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.

Approaching the question in this way we feel unable to say that the law before us may not have been justified by local conditions. It would have been more obviously fair to extend the regulation at least to highways. But it may have been found for all that we know, that the seed of Johnson grass is dropped from the cars in such quantities as to cause special trouble. It may be that the neglected strips occupied by railroads afford a ground where noxious weeds especially flourish, and that whereas self-interest leads the owners of farms to keep down pests, the railroad companies have done nothing in a matter which concerns their neighbors only. Other reasons may be imagined. Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people is quite as great a degree as the courts."

Justice Brown levels a vigorous dissent at the opinion of the court in the principal case. Justice Brown said: "In this case the railway is not pursued as such, but merely as the proprietor of certain land alongside its track, and no reason can be conjectured why an obnoxious form of weed growing upon its land, should be more detrimental than the same weed growing upon adjoining lands. The railway is not made the sole object of the statutory prohibition by reason of the fact that it is a railway, and the discrimination against it seems to be purely arbitrary. The only distinction suggested in support of the ordinance is that the seed of Johnson grass may be dropped from the cars in such quantities as to cause special trouble; but there is not only no evidence of such fact, but it is highly improbable that the seed of a noxious grass of this kind would be carried upon the cars at all. It is also suggested that the self-interest of owners of farms to keep down pests of this kind might be relied upon to prevent their growth. But this tends merely to show that if the law were made general, it would be more readily obeyed by private land proprietors than by the railway. It may be that railways are less given to the observance of precautions required of them as neigh-

borhood land owners than the proprietors of individual property, but that does not create a distinction in principle. It merely tends to show that if the law were made general the railway companies would be oftener prosecuted than other proprietors. If Johnson grass growing upon railway tracks be a nuisance, it is equally so when growing upon the other side of the line fence, and I think the law should be made general, to avoid the charge of an arbitrary discrimination. If the land owned by every corporation were held to this liability, while the land of individuals were exempt, the discrimination would be more conspicuously unjust in its appearance, but scarcely more so in its reality."

WHEN AND IN WHAT CASES WILL A REPRESENTATION AS TO THE VALUE OF REAL OR PERSONAL PROPERTY BE SUFFICIENT TO PREDICATE AN ACTION FOR FRAUD.

The general rule is that representations as to the value of the subject matter of a sale are not sufficient to predicate an action for fraud.¹

¹ Ellis v. Andrews, 56 N. Y. 83, 15 Am. Rep. 379; Cronk v. Cole, 10 Ind. 485, involving a representation of the market value of barley; New Brunswick R. Co. v. Congbear, 9 H. L. Cas. 711, involving exaggerated statements of the profits of a company; Hunter v. McLaughlin, 43 Ind. 38, value of a patented invention. Gordon v. Butler, 105 U. S. 553, a mistaken estimate upon one's best judgment of the value of land gives no action; Crown v. Carriger, 66 Ala. 590; Anderson v. McPike, 86 Mo. 293; Fulton v. Hood, 34 Pa. St. 365; Brown v. Leach, 107 Mass. 364; Cromer v. Perkins, 124 Mass. 431; Wolcott v. Mount, 28 N. J. L. 496, 499; Merrian v. Arbuckle, 81 Ill. 501; Righter v. Roller, 31 Ark. 170; Holbrook v. Conner, 60 Me. 575; Wilkinson v. Clauson, 20 Minn. 91; Bishop v. Small, 63 Me. 12; exaggerated praise is not actionable, Columbia Electric Co. v. Dixon, 46 Minn. 463, 49 N. W. Rep. 244; Directors v. Kisch, L. R. 2 H. L. 99; "dealers' talk," Demming v. Darling, 148 Mass. 504, 505, 20 N. E. Rep. 107; Story, Sales (2d Ed.), secs. 360, 361; Nash v. Trust Co., 34 N. E. Rep. 625; Chase v. Boughton, 54 N. W. Rep. 44, representations as to prospective dividends on certain stock; Robertson v. Parks, 76 Md. 118, 24 Atl. Rep. 411; Totten v. Burhans, 91 Mich. 495, 51 N. W. Rep. 1119. But to represent that stock had paid a specified rate of dividends at prior times has been held to be a statement of a fact. Haudy v. Waldron (R. I.), 29 Atl. Rep. 143, and to same effect, in substance, are: Crane v. Elder (Kan.), 29 Pac. Rep. 151; Childs v. Merrill (Vt.), 22 Atl. Rep. 626; Winston v. Young (Minn.), 49 N. W. Rep. 521; Griffen v. Farrier (Minn.), 21 N. W. Rep. 553; Cruess v. Fessler, 31 Cal. 330. But a purchase of stock from a stockholder at a low price, by an officer of the corporation, is not fraudulent because such officer has knowledge, in his official capacity, of favorable sales of other stock, which enhanced the value of stock generally, and of which fact the seller was ignorant, Crowell v. Jackson, 53 N. J. L. 656, 23 Atl. Rep. 426.

Statements purporting to be mere opinions or expressions of judgment are not such affirmations of facts as warrant another to rely thereon. A representation in order to make the foundation for a recovery in an action for fraud or deceit, must relate to alleged facts, and facts which substantially affect or injure the interests of the complaining party.² If the representation is in reality an "opinion," or mental calculation such as a judgment, or is a matter of "expectation or probability,"³ or a matter of "conjecture,"⁴ fraud cannot be predicated thereon. "Dealers' talk" and such commendations of wares and merchandise commonly indulged in by merchants and salesmen, generally come within the classification of opinions.⁵ Such phrases as "worth so much" and similar commendations resorted to by merchants are treated as mere opinions, and as said by Holmes, J., in Demming v. Darling,⁶ such representations "manifestly are open to difference of opinion, which do not imply untrue assertions concerning matters of direct observation, and as to which it has always been understood the world over that such statements are to be distrusted," and are not actionable. While the law seeks to repress dishonesty, it will not put a premium on slothfulness or on a lack of diligence, but justly presumes that the average man will exercise vigilance and discretion in making contracts and dealing with others. As said by the Supreme Court of Indiana: "If any one relies on mere opinion, instead of ascertaining facts, it is his own folly."⁷ The maxim *Vigilantibus et non dormientibus succurant jura*, and the doctrine of *caveat emptor* are adhered to in the application of this rule.

Opinions are frequently influenced by "whim and caprice." The zealous merchant may indulge in extravagant praise of his goods,

² See Jaggard on Torts, Vol. 1, p. 578.

³ Long v. Woodman, 58 Me. 49; Pedrick v. Porter, 5 Allen, 324; Hazard v. Irwin, 18 Pick. (Mass.) 95.

⁴ Hedin v. Minneapolis Medical & Surgical Inst., 64 N. W. Rep. 158, 159.

⁵ Com. v. Jackson, 132 Mass. 16; Ellis v. Andrews, 56 N. Y. Supp. 83; Bishop v. Small, 64 Me. 12. See, also, Benj. Sales (4th Am. Ed.), sec. 430; Demming v. Darling, 148 Mass. 504, 505, 20 N. E. Rep. 107; 8 Am. & Eng. Ency. of Law (1st Ed.), p. 909, and cases cited in notes 7 and 8; Cooper v. Lovering, 106 Mass. 7.

⁶ 148 Mass. 504, 505, 20 N. E. Rep. 107.

Seiveking v. Litzler, 31 Ind. 13.

and make emphatic and positive statements as to the values of his wares, knowing that his statements are false, and yet not come within the definition of fraud. Men of keen business habits, in order to effect advantageous and profitable contracts, may misrepresent with impunity the value of a commodity upon the market, where opportunities for inquiry are open to the buyer, and the latter may exercise his own judgment without restriction. However justly the moralist may censure the address sometimes resorted to by enterprising and aggressive vendors, yet they are not, in legal contemplation, guilty of fraud.⁸ Opinions and judgments are matters concerning which, as Judge Cooley said: "Many men will be of many minds."⁹ While this rule may in some instances work hardship, yet to establish a contrary doctrine would open the door for a multiplicity of actions based upon the most subtle and simulated charges of fraud and deceit. The general rule, however, is subject to exceptions and the application of the rule is modified in a number of instances. Persons may be dealing in fiduciary relations;¹⁰ representations may be made concerning matters within the exclusive knowledge of the party making them;¹¹ representations may be made under such peculiar conditions or special circumstances as to disarm vigilance.¹²

The rule of *caveat emptor* does not apply when the seller induces a purchase on certain terms by willfully misrepresenting material points.¹³ It is also a rule of law to protect the weak and credulous against the strong and artful, and the inexperienced and unsuspecting against the wiles and snares of the unscrupulous.¹⁴ The feeble and the igno-

⁸ Foley v. Cowgill, 5 Blackford (Ind.), 18. To the same effect is Cronk v. Cole, 10 Ind. 485.

⁹ Cooley on Torts (2d Ed.), p. 565.

¹⁰ Fisher v. Budlong, 10 R. I. 525; Cooley on Torts (2d Ed.), p. 566, note 1, 2, also p. 567 of Cooley on Torts, same edition, and note 3.

¹¹ Hedin v. Minneapolis Medical & Surgical Inst., 64 N. W. Rep. 158; Gordon v. Butler, 105 U. S. 553; Eaton v. Winnie, 20 Mich. 156; Hicks v. Stevens, 121 Ill. 186, 11 N. E. Rep. 241.

¹² See Stewart v. Stearns, 63 N. H. 99, where the buyer, having equal information, was induced to forego inquiry and relied on the seller's statement of value. To the same effect are, Bradbury v. Haines, 60 N. H. 123; Hanger v. Evans, 38 Ark. 334; Grim v. Byrd, 32 Grat. 293.

¹³ See, 8 Am. & Eng. Ency. of Law, p. 811.

¹⁴ See, 2 Bishop's Crim. Law (7th Ed.), secs. 433

rant are as much within the shelter and care of the law as the astute and sagacious.¹⁵ The best illustration of the protection of the weak is to be found in the application of the criminal law under the head of false pretenses. It must be conceded that that principle of protection is recognized to a much greater extent in the law of crimes than in litigation involving civil rights, and cannot be taken as governing the latter. But a brief reference to the criminal law in this particular will be of benefit in discerning and appreciating the logic of the authorities which recognize that in some cases false representations as to value may be sufficient to constitute fraud in an action for damages. In England, the rule is firmly established that any pretense or false representation by word or token, which overreaches the prudent or deceives the credulous, and thereby works a wrong, is sufficient to sustain an indictment for false pretenses; and this rule is adhered to irrespective of whether the methods and representations complained of would have misled a person of ordinary prudence or not.¹⁶ The same doctrine is upheld in Arkansas, Iowa, Michigan, Missouri, Texas, New York, Maine, Mississippi, Tennessee, Pennsylvania and Ohio.¹⁷ This doctrine is important for the reason that a great many authorities have maintained that in order to support an indictment for false pretenses, the representations must be such as would deceive a person of "ordinary intelligence."

436: Lefler v. State, 153 Ind. 82, 83 and 87; 2 Wharton's Criminal Law (10th Ed.), secs. 1188, 1192.

¹⁵ Smith v. State, 55 Miss. 313, 17 Am. L. Reg. (N. S.) 525; McKee v. State, 111 Ind. 378, 381.

¹⁶ 2 Russell on Crimes (9 Am. Ed.), 619, 700; Reg. v. Wooley, 1 Den. C. C. 559, 4 Cox C. C. 193, 3 C. & K. 98, 2 East P. C. 8 pp. 827, 831; Reg. v. Giles, L. & C. 502, 10 Cox. C. C. 44; Reg. v. Jessop, Dears & B. 442, 7 Cox C. C. 399. These authorities are collated in Lefler v. State, 153 Ind. 82, in which case the Supreme Court of Indiana overthrew and expressly overruled all former decisions of that court which held that such a representation must be one which would deceive a person of ordinary prudence.

¹⁷ Johnson v. State, 36 Ark. 242; State v. Fooks, 65 Iowa, 196, 452, 21 N. W. Rep. 561, 773; State v. Montgomery, 56 Iowa, 195, 9 N.W. Rep. 120; People v. Pray, 1 Mich. N. P. 69; State v. Williams, 12 Mo. App. 415; Colbert v. State, 1 Tex. App. 314; *In re Greenough*, 31 Vt. 279, 290; Watson v. People, 87 N. Y. 561, 41 Am. Rep. 397; People v. Cole, 20 N. Y. Supp. 505; People v. Rice, 128 N. Y. 649, 29 N. E. Rep. 146; State v. Mills, 17 Me. 211; Smith v. State, 55 Miss. 513; Watson v. State, 16 Lea. (Tenn.) 604; Commonwealth v. Henry, 22 Pa. St. 253; Thomas v. People, 113 Ill. 531; Bartlett v. State, 28 Ohio St. 669, 670.

gence and prudence."¹⁸ The English cases proceed upon the theory that the law is not only for the protection of the strong and prudent who may be defrauded by the misrepresentations of others, but that it has regard for the weak and unwary as well.¹⁹ In this country the weight of authority maintains that "the design of the law is to protect the weak and credulous from the wiles and stratagems of the artful and cunning and, as well as those whose vigilance and sagacity enable them to protect themselves."²⁰

It is proper to remark, however, that the principle which has for its conception and purpose the protection of the weak is not recognized or applied in civil actions to the extent that it is in criminal prosecutions. A great many cases occur where the aggrieved party may successfully prosecute his wrongdoer on account of false pretenses and at the same time be unable to recover in a civil action the rights he has lost or damages therefor. But there are a great many cases where relief may be obtained. If the buyer has not equal means of knowledge, or having such is induced to forego inquiry and relies upon the seller's statements of value, they are binding.²¹ Where one is purchasing goods, the value of which can only be known to experts and is relying upon the vendor who is a dealer in such goods, to give him accurate information concerning them, an action for fraud may arise.²² There is a multitude of cases which hold that an action may be sustained for false representations as to the price paid by a third person for the property which is the subject

¹⁸ See 9 Ohio S. & C. P. Dec. 825; obtaining money by mere lying is not actionable. See Co. v. Warren, 6 Mass. 72; State v. Simpson, 10 N. Car. 620; Com. v. Baker, 8 Phila. 613; Chapman v. State, 2 Head. 36; but see State v. Reiff, 14 Wash. 664, 45 Pac. Rep. 318, holding that a naked lie would be sufficient, and that the false pretense need not be in the nature of a token or writing, etc. See Roscoe Criminal Evidence, 465, *et seq.*; 11 Wend. 557; 3 Hill, 169; 19 Pick. 186; 50 Ind. 473, 477; State v. Magee, 11 Ind. 154; Leobold v. State, 33 Ind. 484. The Indiana cases cited in this note were expressly overruled in Lefler v. State, 153 Ind. 82, 87 and 88.

¹⁹ Young v. Reg., 3 T. R. 98, Kenyon C. J.

²⁰ McKee v. State, 111 Ind. 378, 381; Smith v. State, 55 Miss. 313; Lefler v. State, 153 Ind. 82, 86, and numerous cases there cited. See also authorities collected in note 17 hereof.

²¹ Stewart v. Stearns, 63 N. H. 99. See Collins v. Jackson, 54 Mich. 186, 19 N. W. Rep. 947.

²² Pickard v. McCormick, 11 Mich. 68; Kost v. Bender, 26 Mich. 515; Pike v. Fay, 101 Mass. 134.

of the negotiations.²³ Representations of price paid for an article are not actionable if parties are dealing at arms' length. It might be otherwise, if confidential relations exist. Where the vendor and vendee are dealing at arms' length with each other, the representations of the former as to the cost of his property, even though false and made with the view to deceive, will furnish no ground of action. They are looked upon merely as representations in regard to value uttered for the purpose of enhancing the price and any purchaser who relies upon them is considered as too careless of his own interests to be entitled to relief.²⁴ "This rule, however, does not apply where any fiduciary relation exists between the vendor and the vendee, or where the property, in regard to the cost of which the vendor makes a false statement, has been bought by him upon the joint account of himself and his vendee. In such cases, a misrepresentation as to the price paid will give a right of action to the deceived party."²⁵ So it has been said that the purchaser of a mill who is ignorant of the business has a right to rely upon the positive assertions of the seller as to the business the mill is capable of performing.²⁶ So where a dealer in patent rights sold certain territory to one who was ignorant of its value, representing it to be very valuable, when he knew it was not, an action for fraud was maintained and recognized.²⁷ Where land is situated in another state at a consid-

²³ Medbury v. Watson, 6 Metc. (Mass.) 246; Ives v. Carter, 24 Conn. 403; Somers v. Richards, 46 Ver. 170; Sanford v. Nandy, 23 Wend. (N. Y.) 269; Kenner v. Harding, 85 Ill. 264; McClelland v. Scott, 24 Wis. 81. See also 8 Volume of the American and English Encyclopedia of Law (1st. Ed.), page 810, where it is said: "Among false statements affecting value which have yet been held fraudulent, are those that a patent had been largely sold and was profitable; that certain persons named had made purchases of other stock of a company; that certain offers had been made for property; and that an old stock of goods was fresh and new." Citing authorities in support thereof.

²⁴ Hemmer v. Cooper, 8 Allen, 334; Holbrook v. Connor, 60 Me. 578; Bishop v. Swall, 63 Me. 12; Benj. Sales, section 430, note "M"; Noething v. Wright, 72 Ill. 390; Hauk v. Brownell, 120 Ill. 161, 11 N. E. Rep. 416.

²⁵ Hauk v. Brownell, 120 Ill. 161, 11 N. E. Rep. 416. See also Banta v. Pullman, 47 Ill. 99; Tucker v. Downing, 76 Ill. 71.

²⁶ Faribault v. Sater, 13 Minn. 223.

²⁷ Allen v. Hart, 72 Ill. 104. See, also, Peffley v. Noland, 80 Ind. 164; McKee v. Eaton, 26 Kan. 226; Wise v. Fuller, 29 N. J. Eq. 257.

erable distance and the prospective vendee for that reason is unable to examine the land and ascertain its character and value, he may be warranted in relying upon the representations of the vendor concerning the value of the improvements, nature and quantity of crops produced in the past and the consequent value of the land.²⁸ The theory of these cases is that whenever a sale of property not present, but at a remote distance is made, and the seller knows that the purchaser has never seen the same and is relying upon the representations of the vendor, as to the character, condition and subsequent value of the land, such representations are treated as constituting in effect a warranty that the seller will make his representations good.²⁹

While these authorities modify the doctrine of *caveat emptor*, yet from the language and reasoning employed, it is apparent that the same authorities place representations of value, with reference to distant property, under the same head as representations concerning property that is present, and that in order that representations as to value of distant property may constitute actionable fraud, there should be coupled therewith representations as to the character and condition of such distant property, commensurate with the represented value. Supporting this line of reasoning, is the case of Home v. Perkins,³⁰ where it was held that where expressions of opinion as to the value are not fraudulent, yet, misrepresentations of facts which throw light upon value, are fraudulent. So that if in connection with the representations of value, additional representations are made pertaining to matters which give credence and support to the pretended value, the foundation for an actionable fraud may be laid. There is another line of authorities, which maintain that a fraudulent recommendation of another's financial standing or ability may be sufficient to support an action for dam-

²⁸ Boldt v. State, 9 Ind. App. 657; Small v. Kennedy, 137 Ind. 299; Kennedy v. Richardson, 70 Ind. 524; Cagney v. Cuson, 77 Ind. 494; Buxton v. Jones, 79 N. W. Rep. 980; Stevens v. Allen, 32 Pac. Rep., 922; Boldt v. Woods, 36 N. E. Rep., 933; Smith v. Richards, 13 Pet. (U. S.) 26, 54 Fed. Rep. 320; Griffin v. Farrier Partners, etc., 21 N. W. Rep. 553.

²⁹ Smith v. Richards, 13 Pet. (U. S.) 26; McCullen v. Scott, 24 Wis. 84.

³⁰ 124 Mass. 431.

ages. The case of *Robbins v. Barton*,³¹ goes to the extreme limit on this proposition. The plaintiff therein brought an action for deceit, alleging that he relied upon certain representations made by the defendant, concerning the financial standing of another. The representation complained of was made in the form of a recommendation as follows: "I consider H. G. Gorton perfectly good for a bill of goods to the amount of \$624.84. H. G. Gorton is safe." It was alleged that the foregoing representation was made by the defendant, who at the time knew that the said Gorton was wholly "irresponsible financially" and that such representation was made for the purpose of fraudulently inducing the plaintiff to make a sale of goods to his damage. The petition of the plaintiff was held sufficient to constitute a cause of action for deceit. The court said: "We think the allegations of the petition bring it within the rule stated in the Am. & Eng. Enc. of Law,³² viz: 'If the party makes representations susceptible of knowledge in such a way as to impress upon the other party the truth of such assertion, but knows that they are false, with intent that the other party shall rely upon them, in case the other party acts upon this representation, it is fraud.' " The court also cites the following authorities:³³

In *Russell v. Clark's Ex'rs.*,³⁴ Chief Justice Marshall said: "The question how far merchants are responsible for the character they give each other, is one of much delicacy, and great importance to the commercial world. That a fraudulent recommendation (and a recommendation known at the time to be untrue would be fraudulent), would subject the person giving it to damages sustained by the person trusting to it, seems now to be generally admitted." In the case of *Pasley v. Freeman*,³⁵ cited in *Robbins v. Barton*, *supra*, it is suggested that if an act in itself immoral, in its consequences injurious to another, and set in motion for the purpose of effecting injury, "be not cognizable and punishable by our laws, our system of jurisprudence is more defective than

has hitherto been supposed." In the case of *Upton v. Vail*,³⁶ the following representation was made: "He is good; as good as any man in the country for that sum." The court held that while that representation involved an opinion, yet, if it was made in bad faith, and with knowledge that the party referred to was insolvent and injury resulted, recovery could be obtained. This case is cited and commented upon with approval in *Hickey v. Morrell*,³⁷ from which the foregoing statement thereof is derived.

The case of *Belcher v. Costello*,³⁸ is much more conservative than the cases just commented upon, and maintains that a representation that another is good financially and amply able to meet obligations given for the purchase price of property, is not necessarily a representation of fact, and neither could it be classified in every instance as a mere expression of an opinion. It is frequently a difficult matter to ascertain whether a statement is one of opinion or of fact and no rule can be formulated to accurately define the circumstances under which representations, either of fact or of opinion may be actionable. A great many cases are complicated with facts peculiar to themselves, and in those cases the courts are inclined to leave the facts to the jury trying the cause to determine whether fraud was intended and acted upon or not. In criminal prosecutions the question is not so vexed, and in the case of *State v. Tomlin*,³⁹ an indictment for obtaining, under false pretenses, a note at a low price, by representing that the maker was insolvent, was held good. Following the same logic is the case of *State v. Montgomery*,⁴⁰ and the text and citations collated in Am. & Eng. Enc. of Law.⁴¹

While the vendor's false representation of the value of the article which he proposes to sell is not generally actionable, yet it has been held that this immunity is not extended to a person not the vendor, or third parties. Such a person is held responsible generally for a false representation of value, "the excuse of interest, and the natural disposition

³¹ 31 Pac. Rep. (Kan.) 686.

³² Vol. 5, p. 328.

³³ *Wakeman v. Dalley*, 51 N. Y. 27; *Hazard v. Irwin*, 18 Pick. 95.

³⁴ 7 Cranch, 69.

³⁵ 3 Term. R. 51.

³⁶ 6 Johns. 181.

³⁷ 7 N. E. Rep. (N. Y.) 321.

³⁸ 122 Mass. 188.

³⁹ 20 N. J. L. 13, 23.

⁴⁰ 56 Iowa, 185.

⁴¹ Vol. 7, p. 753.

of men to overestimate their own property, not being allowed in such a case."⁴² In *Percival v. Harres*,⁴³ the plaintiff brought an action for conspiracy to defraud. The evidence disclosed that one of the defendants purchased plaintiff's stock of groceries, giving certain notes in payment with the second defendant as indorser thereon, the acceptance of which notes was brought about by the representations of a third defendant. The plaintiff claimed that the third defendant made specific representations as to the financial responsibility of the indorsing defendant, "including statements not only of his real estate, but also as to his bank account and the balances then to his credit therein." The sale was hurriedly consummated and shortly thereafter, the purchaser disposed of said groceries at auction. The notes subsequently becoming due were not paid, and both the purchaser and indorser proved "financially irresponsible." The lower court directed a verdict for the defendants, and the Supreme Court of Pennsylvania on appeal held that the case should have been submitted to the jury to determine whether or not a conspiracy to defraud the plaintiff existed among the defendants.

In *Redding v. Wright*,⁴⁴ an action was brought for deceit in the sale of stock in a certain corporation. One of the defendants, a member of the corporation, while offering his stock for sale, falsely and fraudulently represented that the corporation was not in debt and that it was making profits averaging a specified amount. There were several defendants, members of the corporation, and it appeared that they were acting together in bringing about the purchase. It was contended by the defendants that the plaintiff had no right to reply upon the representations of the defendants in the matters, of which he could readily have acquired knowledge from other sources. The Supreme Court of Minnesota declined to sanction this contention, and among other things said: "It will be observed that the representations to which attention is directed here, were concerning matters which the plaintiff might

well presume to have been within the personal knowledge of the defendants, but which the plaintiff could not learn by a cursory inspection, nor without careful inspection into the affairs of the corporation, or by information from some person who had acquired knowledge of such matters, and whose information might be relied upon as trustworthy." The court held that the representation complained of under the circumstances of that case, could not be classed as mere opinions nor as the exaggerated estimates of the vendor, and that the rule of *caveat emptor* did not apply if the jury believed that the statements were made by the defendants with knowledge of their falsity and for the purpose of defrauding the plaintiff.

The case of *Hedin v. Minneapolis Medical Institute*,⁴⁵ is an extraordinary one, wherein the plaintiff, being an illiterate man, physically a wreck and seriously injured in an accident, consulted the defendant, a physician and surgeon in charge of the defendant medical and surgical institute, and who represented to the plaintiff that his injuries and afflictions were curable and that the institute would undertake his treatment and positively cure him for five hundred dollars. The plaintiff paid such sum and received no benefit from the treatment, and his injuries were in fact of an incurable kind. The plaintiff succeeded in the lower court, and on appeal, the Supreme Court of Minnesota held that the plaintiff had a right to rely upon the representations, and that the jury might fairly have inferred that the defendants purposely and fraudulently took advantage of the plaintiff's illiteracy and enfeebled physical condition to represent that they could cure his afflictions, and thereby procured the sum of five hundred dollars. The theory of that case is that where parties possess special learning or knowledge upon a subject, with respect to which their opinions are given or sought, such opinions should be honestly and sincerely made and that opinions of that kind are capable of approximating the truth, and that for a false statement of them, when deception is designed, and injury has followed, an action will lie.

It is apparent from the cases catalogued and discussed that while the general rule precludes recovery on account of representations as to the value of the subject-matter of a sale,

⁴² *Busterud v. Farrington*, 31 N. W. Rep. 360; *Medbury v. Watson*, 6 Metc. 246.

⁴³ 21 Atl. Rep. 876.

⁴⁴ 51 N. W. Rep. 1056.

⁴⁵ 64 N. W. Rep. 185.

yet a great many cases occur, in which, by reason of the facts, just and good conscience compel a relaxation of the general rule and exceptions have arisen. It is impossible, however, to single out and accurately define every exception, so that every case is largely determined by the nature and character of the facts which surround it. It is to be observed from the authorities commented upon that, although the general rule is recognized by all courts, yet the same courts are not at all reluctant to depart from its application whenever a case is presented in which the slightest coloring of fraud or unfair dealing is manifest.

WALTER J. LOTZ.

Muncie, Ind.

FORMER JEOPARDY — SHOOTING AND BURGLARY IN SAME TRANSACTION.

MANN v. COMMONWEALTH.

Court of Appeals of Kentucky, April 29, 1904.

Where defendants break into a house at night with intent to steal money, which they abstract from the householder's pocket, and on his awaking shoot him, the burglary and the shooting do not constitute a single transaction out of which two offenses cannot be carved, so as to render a conviction of the shooting a bar to a prosecution for the burglary.

HOBSON, J.: Appellants, Thomas Mann and Edward Morris, were indicted and convicted of burglary, their punishment being fixed at confinement in the penitentiary for 10 years. The proof shows that they, in company with one Charles Sanders, went from Maysville in a buggy, about 10 miles to the house of John B. Farrow, or near it, and there tied their horse, and after entering the house through the window, in the nighttime, proceeded to rob Farrow by taking some money that was in his pants pocket. Some noise they made waked up Mrs. Farrow, who roused her husband, and thereupon the defendants, or one of them, shot Farrow in the arm, and also in the back. The same grand jury that found the indictment for burglary also found an indictment against them for shooting Farrow, and on this last indictment they were tried and convicted. Mann appealed to this court, and that judgment was affirmed. *Mann v. Commonwealth*, 79 S. W. Rep. 230. When arraigned on the charge of burglary, they pleaded the conviction under the indictment for the shooting of Farrow, in bar of the proceeding.

While the indictment on the charge of burglary contains some necessary averments as to the larceny committed by them after they entered the house, it is a charge only of burglary, the allegations as to the stealing of the money by putting Farrow in fear and shooting him being appar-

ently only added to illustrate the felonious intent with which the defendants entered the house as charged in the indictment. The burglary was complete when the felonious entry was made, and the defendants might have been indicted and convicted therefor, although they had stolen nothing in the house, or committed no other crime after they entered it. The allegations, therefore, of the indictment, as to what they did after they entered the house, are surplusage, although the facts so alleged might be properly given in evidence before the jury, on the trial, to show the intent with which the entry was made. These averments are simply statements of evidential matter, which should have been omitted from the indictment.

Burglary is defined as "the breaking and entering in the night of another's dwelling house, with intent to commit a felony therein." 1 Bishop on Criminal Law, § 559. "If a man in the nighttime breaks into a dwelling house, intending to commit therein some act which in law is felony, he is guilty of burglary, whether he succeeds in doing what he meant or not." 1 Bishop on Criminal Law, § 437. It is insisted, however, for appellants that the defendants entered the house to steal the money, and that the entry of the house, the stealing of the money, and the shooting of Farrow were all one transaction done in pursuance of one intent, and that out of it the commonwealth cannot carve two offenses. In support of this view we are referred to a number of authorities. Thus in *Fisher v. Commonwealth*, 64 Ky. 211, 89 Am. Dec. 620, where the defendant by the same act and with the same intent took a horse, wagon and harness, it was held that an acquittal of stealing the horse was a bar to an indictment for the stealing of the wagon and harness, and the rule was applied that out of one transaction committed with the same intent two offenses could not be carved. The same rule was applied in *Triplett v. Commonwealth*, 84 Ky. 193, 1 S. W. Rep. 84, where an acquittal of the offense of burglary was held a bar to a prosecution for larceny forming part of the same transaction. The court said: "At common law, in an indictment for burglary, a count might be added for the larceny when there had been an actual taking, and it therefore resulted that an acquittal of the burglary with intent to steal constituted no bar to a prosecution for the actual theft. Without the intention to commit a felony, the mere fact of breaking would not at common law, constitute a burglary; and when the intent to steal is charged, and the party acquitted, it would seem that a subsequent indictment for grand larceny, with the same facts developed on the trial, would be placing the accused in jeopardy the second time for the same offense. The weight of authority, we are aware, is adverse to such a view of the question, but the whole reason and philosophy of the law, as well as justice to the accused, require a different ruling." In *Herera v. State* (Tex. Cr. App.), 34 S. W. Rep. 943, it was

held by the Texas court that a conviction for assault with intent to kill was a bar to an indictment for robbery committed in the same transaction. But none of these cases are precisely in point here. It is misleading to say that the shooting of Farrow and the burglarious entry of the house were committed in the same transaction, in the sense in which this term is used by the authorities. See 1 Bishop on Criminal Law, §1060. Thus in the Fisher Case the one act of the defendant was the taking of the horse, wagon and harness; but here there were two acts of the defendant—the burglarious entry of the house, and the shooting of Farrow in the house after this act had terminated. These are no more one transaction than if the defendants had successively shot two different persons in the same difficulty. The shooting of Farrow could not have been set out in a second part of the indictment for burglary, or joined with that charge. The robbery of the person by putting him in fear was not complete before the assault with intent to kill was committed; so, therefore, neither the Triplett Case nor the Herera Case applies. In the case before us the entry into the house was for the purpose of theft. The shooting of Farrow came about because he waked up, and was nothing more than a new offense which the commission of the offense intended induced the defendants to commit. It is no more one transaction than it would be if the defendants had set fire to the house, after robbing it, to conceal the evidence of their crime, or had shot Farrow's son as they escaped, to prevent his being a witness against them. In Teaf v. State, 24 Am. Rep. 708, two men were wounded mortally by two almost simultaneous shots fired by the defendant and another, lying in ambush. It was held that a conviction for the killing of one of the men was not a bar to an indictment for the killing of the other. In State v. Nash, 41 Am. Rep. 472, the defendant fired twice in quick succession upon a crowd of persons, wounding one at the first shot and another at the second. It was held that a conviction for the wounding of the first was not a bar to an indictment for the wounding of the second. In Jones v. State (Miss.), 6 So. Rep. 231, 14 Am. St. Rep. 570, the defendant wounded two men in the same difficulty. The conviction for one was held no bar for a prosecution for the other. To same effect are McCoy v. State, 46 Ark. 141; Augustine v. State (Tex. Cr. App.), 52 S. W. Rep. 77; Winn v. State, 82 Wis. 571, 52 N. W. Rep. 775; Greenwood v. State, 64 Ind. 250; Ashton v. State, 31 Tex. Cr. R. 482, 21 S. W. Rep. 48; Samuel v. State, 25 Tex. App. 538, 8 S. W. Rep. 656. Other cases are also collected in a note to State v. Nash, 41 Am. Rep. 475. Referring to this line of cases Mr. Bishop, in the last edition of his work on Criminal Law, § 1061, says: "Obviously, there is a difference between one volition and one transaction. And, on a view of our combined authorities, there is little room for denial that in one

transaction a man may commit distinct offenses of assault or homicide upon different persons and be separately punished for each." So in American & English Encyclopedia of Law, vol. 17, p. 603, it is said: "A putting in jeopardy for one act is no bar to a prosecution for a separate and distinct act, merely because they are so closely connected in point of time that it is impossible to separate the evidence relating to them on the trial for the one of them first had." It has been held that, if a man burns a dwelling-house and thereby takes the life of one of the inmates, he cannot, after being convicted of arson be also convicted of murder; and so it has been held that if a man by the same blow wounds two men, or kills two by the same discharge of a gun, a conviction for the wounding or killing of one will bar a prosecution for the wounding or killing of the other; but on this subject the authorities are divided. Bishop's New Criminal Law, §§ 1058-1061. The ruling in the arson case is put on the ground that the force which the defendant started destroyed the house and killed the person without any further action or new impulse from him. The ruling in the cases where two persons are wounded or killed by the same act is put in part on the ground that the wounding or killing of both might be charged in one indictment, and in part that there was no new impulse or act on the part of the defendant. But in the case before us the defendant could not be prosecuted under one indictment for the burglary and the shooting of Farrow. Here there was a new volition on the part of the defendant, and a new force set in motion by him, after the burglary was complete. If he cannot be prosecuted in separate indictments for the two offenses, it results that although he committed both, one beginning after the other was completed, and being the result of a separate volition as well as a new force, the constitutional provision forbidding his twice being punished for one offense will operate to shield him from punishment for a separate and independent offense simply because it was followed in close succession by another offense which he committed.

Judgment affirmed.

Note.—Identity of Offenses Arising Out of the Same Transaction as Affecting the Plea of Former Jeopardy.—There is sometimes some confusion in stating the rule of former jeopardy in its application to offenses arising out of the same transaction. It is true that the prosecution may not carve two offenses out of the one transaction. Fisher v. Commonwealth, 61 Ky. 211; Herera v. State (Tex. Cr. App.), 34 S. W. Rep. 943. But this does not prevent the legislature from carving out of one transaction more than one offense. United States v. Harmison, Fed. Cas. No. 15,308, 3 Sawy. 556; State v. Williams, 11 S. Car. 288. An individual may, therefore, at the same time, and in the same transaction, commit two or more distinct crimes; and an acquittal of one is not a bar to an indictment for the other. State v. Standifer, 5 Port. (Ala. 1837) 323; State v. Innes, 53 Me. 536; Heat v. State, 53 Miss. 439. Thus the offenses of big-

amy and continuous cohabitation arising out of the same transaction may be separately prosecuted. *Brewer v. State*, 59 Ala. 101. See also bigamy and adultery arising out of the same transaction, may be tried separately. *Swancoat v. State*, 4 Tex. App. 105. But see *Ex parte Nielson*, 131 U. S. 176. Burglary and robbery are distinct offenses which may be separately tried. *Copenhagen v. State*, 15 Ga. 264. Indictment for murder of unborn child and indictments for producing abortion, although arising out of the same transaction are distinct offenses, and acquittal of one is no bar to prosecution of the other. *State v. Elder*, 65 Ind. 282, 32 Am. Rep. 69. But see *contra*: *Lohman v. People*, 1 N. Y. 379, 49 Am. Dec. 340. The same shot may justify a prosecution for malicious injury to horse and for shooting with intent to kill. *State v. Horneman*, 16 Kan. 452; *Irvin v. State*, 7 Tex. App. 78. Nor is the prosecution for adultery a bar to a prosecution for seduction under promise to marry, or for lewd cohabitation. *Smith v. Commonwealth* (Ky. 1895), 32 S. W. Rep. 137; *Morey v. Commonwealth*, 108 Mass. 433. Selling another person's property as one's own will justify a prosecution for embezzlement as well as for obtaining money under false pretenses. *State v. Falkner*, 39 La. Ann. 811, 2 So. Rep. 539. Embezzling cloth and materials is a separate offense from embezzling overcoats though arising in the same transaction. *Commonwealth v. Clair*, 89 Mass. 525. A conviction for profanity and intoxication is not a bar to a prosecution for disturbance of religious worship, although arising out of the same transaction. *Ball v. State*, 67 Miss. 358, 7 So. Rep. 353. So also a man may be convicted of disturbing religious worship and immediately thereafter prosecuted for shooting to kill, although both transactions rest on the same facts. *State v. Ross*, 72 Tenn. 442. But see *State v. Townsend* (Dela. 1837), 2 Har. 543, where it was held that a person could not be prosecuted for riot and disturbing religious worship by such riot. A physician may be prosecuted for malpractice on a particular patient and also on the same charge for the purpose of depriving him of the right to practice. *In re Smith*, 10 Wend. (N. Y.) 449. Swearing falsely to attachment affidavit will justify a prosecution for perjury and also for illegal procurement of attachment. *State v. Williams* (N. Car. 1804), Conf. Rep. 474. An indictment for seduction and one for fornication and bastardy, arising out of the same transaction, may be prosecuted separately. *Dinky v. Commonwealth*, 17 Pa. St. 126, 55 Am. Dec. 542. Advice given to two slaves to abscond is separate offenses as to each slave. *Smith v. Commonwealth*, 7 Grat. (Va.) 593.

Those authorities which hold, under the facts in each particular case, that the plea of former jeopardy was good, generally hold to the rule that if the acts alleged in the second indictment are embraced in the charge contained in the first, and have been given in evidence to procure the first conviction and increase the punishment, the first conviction is a bar to any second prosecution for those acts. *State v. Lindsey*, 61 N. Car. 468. Thus when one brings a file into jail to enable two prisoners to escape, he was guilty of only one offense. *Hurst v. State*, 86 Ala. 604, 6 So. Rep. 120, 11 Am. St. Rep. 79. An acquittal for robbery bars a prosecution for false imprisonment. *Fox v. State*, 50 Ark. 528, 8 S. W. Rep. 836. Two defamations of character in the same place, at the same time, do not constitute separate offenses. *People v. Stephens*, 79 Cal. 428, 21 Pac. Rep. 856, 4 L. R. A. 845. Breaking the peace and injuring the court house are not separate offenses. *Reddy v. Commonwealth*, 97 Ky. 784,

31 S. W. Rep. 730. Two statutes, each providing for a penalty against bawdy houses, cannot be separately enforced. *People v. Cox*, 107 Mich. 435, 65 N. W. Rep. 283. Stealing bank notes and collateral are not separate offenses. *State v. Moore*, 66 Mo. 372. Running a race and betting on it are not two offenses. *Fiddler v. State*, 26 Tenn. 508.

Same Rule as Applied to Larceny and Similar Offenses.—The principal case deals with the subject of burglary, which makes it incumbent on the annotator to examine this phase of the question a little more closely. In the first place it may be said to be well settled that a conviction in a trial for larceny is not a bar to a prosecution for burglary with intent to commit larceny. *Gordon v. State*, 71 Ala. 315; *Bowen v. State*, 106 Ala. 178, 17 So. Rep. 335; *Wilson v. State*, 24 Conn. 57; *State v. Warner*, 14 Ind. 572; *People v. Parrow*, 80 Mich. 567, 45 N. W. Rep. 514; *State v. Hackett*, 47 Minn. 425, 50 N. W. Rep. 472, 28 Am. St. Rep. 380; *State v. Martin*, 76 Mo. 337; *Howard v. State*, 8 Tex. App. 447; *Loakman v. State*, 32 Tex. Cr. Rep. 563, 25 S. W. Rep. 22. But see the following authorities holding to a contrary view: *Tripplett v. Commonwealth*, 84 Ky. 193, 1 S. W. Rep. 84; *State v. Cooper*, 13 N. J. Law, 361, 25 Am. Dec. 490; *State v. Lewis*, 9 N. Car. 98, 11 Am. Dec. 741; *Davies v. State*, 43 Tenn. 77; *State v. DeGraffenreid*, 68 Tenn. 287. A conviction for stealing certain goods is a bar to a prosecution for receiving such stolen goods. *United States v. Harmison*, Fed. Cas. No. 15,308, 3 Sawy. 556. But an acquittal from a charge of larceny is not a bar to a subsequent prosecution for receiving stolen goods. *Foster v. State*, 39 Ala. 229. Petit larceny and false pretenses may be two offenses arising out of the same transaction. *Dominick v. State*, 40 Ala. 680. So also an acquittal on a charge of theft, because the owner of the money parted with both the possession and ownership when he handed it to defendant, is no bar to another prosecution for swindling the owner out of such money. *Lewis v. State* (Tex. Cr. App. 1894), 24 S. W. Rep. 906.

JETSAM AND FLOTSAM.

INSANITY AS A DEFENSE TO A TORT ACTION.

As a general rule, insane persons are liable for their torts. See *Weaver v. Ward*, Hob. 134. Public policy is thought to overcome the technical difficulty that since such people are often incapable of volition, the things which they do are not strictly their own acts. Since it is a question which of two innocent estates shall suffer, putting the loss on the property of the insane defendant is thought to secure greater vigilance by his guardians, and to be desirable as protecting the public. *McIntyre v. Sholty*, 121 Ill. 660. It has been suggested that this rule is too strict, and that wherever the state of a man's mind is important as in negligence or malicious prosecution, insanity should be a defense. *Holmes, Common Law*, 109. See 10 Harry. L. Rev. 182. The same considerations of public policy, however, apply here, and it is hard to see why, if the law holds a man in spite of his inability to do otherwise it should not also hold him in spite of his inability to exercise due care or to harbor malice. In this connection the attitude of the courts toward slander and libel is interesting. In America it is considered fairly well settled, on the strength of three or four decisions and several *dicta*, that insanity is a complete defense in such an action. *Bryant v. Jackson*, 6 Humpk. (Tenn.) 199; *Horner v. Marshall*,

Administratrix, 5 Munf. (Va.) 466; Gates v. Meredith, 7 Ind. 410. See Avery v. Wilson, 20 Fed. Rep. 856. In England the only authority seems to be a *dictum* that it is no defense. See Mordaunt v. Mordaunt, 39 L. J. Prob. & Matri. 57, 59. The reasons given for the American attitude are two, that malice, of which an insane mind is incapable, is a necessary ingredient of these actions, and that presumptively publications from such a source do not injure. On these grounds the Court of Appeals of Kentucky has recently added another decision to the American group. Irvine v. Gibson, 77 S. W. Rep. 1106.

It is submitted, however, that neither the English *dictum* nor the American doctrine is satisfactory. The liability should not be absolute, nor the defense complete. It is true, malice is usually regarded as essential to libel or slander, but that has come to mean merely "legal malice," which is inferred from the voluntary act. Bromage v. Prosser, 4 B. & C. 247, 253. So here again the only reason an insane person should escape is the absence of volition, and it has been seen that that is no defense under the general rule. Even if actual malice were required, however, it is hard to comprehend, as has been said, why public policy may not as well dispense with this as with the necessity of volition. Of course the absence of intent and of malice is always important to prevent punitive damages.

The second reason given for the American attitude is more important. Undoubtedly there is a presumption that the vaporings of a diseased brain do not injure, yet this is not always true. The public may be ignorant of the insanity, or it may be such that the words still have some weight. See Dickinson v. Barber, 9 Mass. 225; Yeates v. Reed, 4 Blackf. (Ind.) 463. The presumption that such utterances are not damaging should be a rebuttable presumption, not an absolute one. In ordinary slander, this would leave only the usual burden on the plaintiff, but where an action is maintainable without proof of damage, as in assault, libel, and slanderous words actionable *per se*, it would do away with that exemption, and make it necessary for the plaintiff to show some actual damage before he could succeed. Only when no actual damage can be shown, should the defense be complete.—*Harvard Law Review*.

BOOK REVIEWS.

FARNHAM ON WATERS AND ON WATER-RIGHTS.

What is destined to become one of the greatest law books of the age is Henry P. Farnham's work on the subject of Waters and Water Rights which has just been issued from the press. Indeed, no man, of even ordinary ability, could work twelve years on a single work and not bring forth something of some value, or, at least, considerable interest. But, when we take into consideration, Mr. Farnham's ability and experience as associate editor of the Lawyers' Reports Annotated, we have reason to expect from twelve years' labor on the part of such a man, a book of very superior, and, indeed, of almost incomparable value.

The wonderful minuteness of preparation and almost absolute exhaustiveness which are the most prominent characteristics of this work is shown by the steps taken by the author in gathering and digesting his material. It was intended from the start to make this work complete on every branch of the subject—in effect, to close this chapter of the law at 1904, leaving nothing to be looked for, directly or inferentially connected with the subject of "waters." To that end not only the 17,000 cases here cited, but every volume of every series of reports, American and English, have been examined page by page. Every case in the slightest degree involving the question of water-rights, or which throws any light upon any

branch of the subject of waters, has been brought "under the microscope." The thoroughness and minuteness in this mere preliminary work, extending over a period of twelve years, would have involved prohibitive expense were it not for the fact that it was done in connection with the annotation and editorial work in the Lawyers' Reports Annotated.

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Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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87. CONSTITUTIONAL LAW—Action Against Stockholder.—Interest upon the individual liability of a stockholder does not run until in some other manner he is charged with notice that he is to be held for a specific corporate obligation.—Manley v. Mayer, Kan., 75 Pac. Rep. 550.

88. CONSTITUTIONAL LAW—Due Course of Law.—The remedy by due course of law requires before a judicial determination affecting the rights of property, that process be issued and personally served when practicable.—Bear Lake County v. Budge, Idaho, 75 Pac. Rep. 614.

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54. CRIMINAL TRIAL—Absence of Judge from Courtroom.—The absence of the judge from the courtroom in a criminal case held such as to constitute it reversible error.—Graves v. People, Colo., 75 Pac. Rep. 412.

55. CRIMINAL TRIAL—Application for Separate Trial Where Jointly Indicted.—An application for separate trials of defendants jointly indicted, not made until the day set for the trial and after the state had announced ready, held too late.—Austin v. State, Ala., 35 So. Rep. 879.

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TO ALL THE "DIGESTS OF CURRENT OPINIONS" IN VOL. 58.

This subject-index contains a reference *under its appropriate head* to every digest of current opinions which has appeared in the volume. The references, of course, are to the pages upon which the digest may be found. There are no cross-references, but each digest is indexed herein under that head, for which it would most naturally occur to a searcher to look. It will be understood that the page to which reference, by number, is made, may contain more than one case on the subject under examination, and therefore the entire page in each instance will necessarily have to be scanned in order to make effective and thorough search.

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